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ATTORNEY FOR APPELLANTS:

MICHAEL L. MUENICH
Highland, Indiana

ATTORNEY FOR APPELLEE:

JAMES E. EASTERDAY
Easterday & Ummel
Plymouth, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

PETER ROTTIER and EDYTHE
ROTTIER, Husband and Wife, and the
LAKE COUNTY TRUST COMPANY,

Appellants-Defendants,

VS.

COUNTY OF STARKE, INDIANA,

Appellee-Plaintiff.

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No. 75A03-0611-CV-516

APPEAL FROM THE STARKE CIRCUIT COURT
The Honorable Kim Hall, Judge
Cause No. 75C01-0106-CP-269

February 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Peter and Edythe Rottier and the Lake County Trust Company (“Appellants”) appeal the trial court’s judgment denying their request for attorney’s fees from Starke County. We affirm.

Issue

Appellants raise two issues on appeal, which we consolidate and restate as: Whether the trial court abused its discretion in denying their request for attorney’s fees.

Facts and Procedural History

For more than twenty years, the parties have been arguing about an alley. In 1986, the Appellants sought permission to move the alley, in which Starke County held a property interest. Starke County agreed, giving four conditions. In 1988, Starke County issued a zoning permit allowing the Appellants to construct a garage in the original alley. The Rottiers spent money building the garage and clearing the new alley. In 1988 and 1992, Starke County communicated that the matter was resolved.

In 2001, Starke County filed a complaint for permanent injunction, seeking to force the Appellants to open the original alley to the county. The Appellants answered and asserted the affirmative defense of estoppel. In addition, the Appellants filed a counterclaim seeking an order compelling Starke County to adopt an ordinance vacating the original alley and an order for attorney’s fees, pursuant to Ind. Trial Rule 11 and Ind. Code § 34-52-1-1(b). After a bench trial, the trial court entered judgment for Starke County.

On appeal, this Court reversed the trial court, remanding for “entry of judgment in favor of Appellants” and “for an order directing Starke County to vacate the original

easement or alleyway . . .” Rottier v. Starke County, No. 75A03-0509-CV-452, slip op. at 19 (Ind. Ct. App. May 11, 2006), trans. denied. On August 18, 2006, the trial court entered judgment, ordering Starke County to adopt an ordinance vacating the original alley and to provide copies of the ordinance to the county recorder and county auditor. On August 29, 2006, the Appellants filed a Motion to Correct Errors, seeking costs and attorney’s fees of \$17,110.26. In ruling on the Appellants’ motion, the trial court denied the request for attorney’s fees, but ordered “that the costs are taxed against” Starke County. Appendix at 9. The trial court made clear that it did not find Starke County’s claim to be “frivolous, unreasonable, groundless, or litigated in bad faith.” Id. at 8. This appeal ensued.

Discussion and Decision

I. Applicable Statute and Standard of Review

With certain common law exceptions, Indiana courts have followed the American rule that a party is not entitled to attorney’s fees simply by virtue of prevailing in the litigation. See State Bd. of Tax Comm’rs v. Town of St. John, 751 N.E.2d 657, 658-64 (Ind. 2001). In several areas, however, statutes provide for the awarding of attorney’s fees. One such statute controls in this case.

In any civil action, the court may award attorney’s fees as part of the cost to the prevailing party, if the court finds that either party:

- (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;
- (2) continued to litigate the action or defense after the party’s claim or defense clearly became frivolous, unreasonable, or groundless; or
- (3) litigated the action in bad faith.

I.C. § 34-52-1-1(b).¹ We review the denial of attorney’s fees under this statute for an abuse of discretion. Mitchell v. Mitchell, 695 N.E.2d 920, 924 (Ind. 1998).

II. Application

In response to their initial appeal, this Court held in favor of the Appellants, directing the trial court to order Starke County to adopt an ordinance vacating the original alley.² The trial court did so. Appellants, the prevailing party in the appeal, now contend that the trial court erred in denying their request for \$17,110.26 in attorney’s fees, pursuant to T.R. 11 and I.C. § 34-52-1-1(b).

First, an award under I.C. § 34-52-1-1(b) is discretionary. Second, a court may award attorney’s fees only if making one of the above three findings. To the contrary, the trial court found that Starke County’s claim was not frivolous. As a substitute for argument, the Appellants accuse the trial court of being passive, entering a vacuous order, and “riding tandem with Starke County.” Appellants’ Br. at 9. Meanwhile, the Appellants accuse Starke County of being recalcitrant, acting in bad faith, and sending an “audacious notice.” Id.

¹ Prior to recodification, this statute appeared at Ind. Code § 34-1-32-1.

² The record reveals that Starke County has not yet adopted the required ordinance, despite this Court’s decision of May 11, 2006. Failure to comply promptly with this Court’s decision and the trial court’s order could constitute contempt. Furthermore, Starke County could potentially be subject to an action for slander of title that provides for the recovery of attorney’s fees. See I.C. § 32-20-5-2; Miller v. Weber, 839 N.E.2d 204, 211 (Ind. Ct. App. 2005), trans. denied.

We note that the trial court has not yet ruled on the Appellants’ Motion for Rule to Show Cause. If the trial court fails to act in a timely manner, the affected party may move, pursuant to Ind. Trial Rule 53.1, for the cause to be withdrawn from the trial judge and transferred to the Supreme Court for the appointment of a special judge.

Finally, we also note that the Appellants express concern in their brief that, at some time in the future, they “might” be compelled to dedicate the new alley to public use. Appellants’ Br. at 8. This issue is not ripe. See, e.g., Logan v. Royer, 848 N.E.2d 1157, 1160 (Ind. Ct. App. 2006). In our earlier decision, we held that Starke County was estopped from asserting the dedication of a new alley as a condition of vacating the original alley. Rottier v. Starke County, No. 75A03-0509-CV-452, slip op. at 19 (Ind. Ct. App. 2006), trans.

These assertions fail to persuade us that the trial court abused its discretion in denying the Appellants' request for attorney's fees. Indeed, it would be particularly difficult to conclude that Starke County acted in bad faith when the trial court ruled initially in its favor.

Trial Rule 11 functions similarly to the above statute, allowing a trial court to impose sanctions when it determines that an attorney has signed a document containing information he or she knows to be false. Srivastava v. Indianapolis Hebrew Congregation, Inc., 779 N.E.2d 52, 58 (Ind. Ct. App. 2002), trans. denied. For the same reasons as above, we reject the Appellants' claim for attorney's fees pursuant to T.R. 11.

Conclusion

We conclude that the trial court did not abuse its discretion in denying the Appellants' request for attorney's fees.

Affirmed.

BAKER, J., and NAJAM, J., concur.

denied. This was precisely the relief the Appellants sought in making an estoppel argument.